IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1970

No. 24

WILLIAM P. ROGERS, Secretary of State,

Appellant,

vs.

ALDO MARIO BELLEI

On Appeal from the United States District Court for the District of Columbia

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AMICUS CURIAE BRIEF OF JAMES SINCLAIR

JAMES SINCLAIR
Room 404
1680 North Vine Street
Los Angeles, California 90028

Amicus Curiae

TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

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INTEREST OF AMICUS CURIAE

The argument of the Appellee, if successful, will create a horde of dual citizens which will

burden our nation, and there is a remote possibility of escalation to nuclear war in these troubled times if someone makes a political miscalculation about responsibility for one of these citizens. Beyond this general interest, amicus has a special interest in the upholding of Congressional and Treaty powers reasonably to regulate dual citizenship: present litigation as to his marital status has raised a question of citizenship depending upon the expatriating constitutionality of a treaty and a statute.

ARGUMENT

I

UNITED STATES CITIZENSHIP OF A DUAL NATIONAL IS NOT PROTECTED BY THE FOURTEENTH AMENDMENT

Appellee Bellei claims that no citizen's citizenship can be taken away without his explicit consent, relying on Afroyim v. Rusk, 387 U.S. 253 (1967) where it was held that the United States cannot terminate citizenship, but that a citizen has to make an express renunciation of United States citizenship. (Mr. Afroyim was a dual national: 387 U.S. 253, 270.) The court below so thought, holding that once Congress gave appellee a conditional citizenship, it was converted by Afroyim into an unconditional citizenship:

"We hold only that Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant. The broad teaching of Afroyim and Schneider is that once American citizenship has been recognized or conferred, Congress may not remove the status; it is for the citizen to abandon his citizenship voluntarily."

Bellei v. Rusk,
296 F. Supp. 1247, 1252.

Thus a citizen can take on a new nationality by swearing allegiance and retain United States citizenship if he does not, in front of a State Department official, sign a renunciation of United States citizenship. He might even take on numerous simultaneous nationalities, under Afroyim.

Amicus curiae solemnly contends that such is not the law, and if that is what Afroyim stands for, Afroyim was wrongly decided and must be overruled.

Amicus curiae contends that Appellee should have effectively elected a single citizenship upon majority and done whatever necessary to shed the other. See Appellant's Brief, pp. 21-26.

Amicus curiae contends that acquiring citizenship or suffering native citizenship in any other nation is incompatible with United States citizenship and allegiance. And it is in the power of the United States government to define and recognize such other allegiance after majority as an implied voluntary expatriation (by regulation consistent with the due process clause of the Fifth Amendment as interpreted by this Court to protect against unreasonable expatriation by "a group of citizens temporarily in office;" Afroyim v. Rusk, 387 U.S. at 268). It is not that appellee "resided in a foreign country," but that he failed to show an undivided allegiance when reasonably required to do so.

The same "group of citizens" could as easily expatriate by enacting a death penalty for temporarily unpopular acts. And this Court would meet the issue, remote as it is, by a carefully reasoned limited nullification under constitutional due process requirements or the Eighth Amendment, etc.

The policy of the Court has been to avoid impairing the reasonable and necessary powers of the executive and legislative branches of government by announcing constitutional interpretations no broader than necessary to decide the controversy before it (Communist Party v. Control Board, 367 U.S. 1, 72). There was no need to go beyond the Fifth and Eighth Amendments to read into the Fourteenth anything beyond what establishes citizenship.

It appears the Afroyim decision has been stated in too broad terms, in fact was wrong in declaring an unbridled citizenship under the Fourteenth Amendment. Four members of the Court dissented; amicus curiae contends they were correct. The history of the Fourteenth Amendment shows no such unbridled grant of citizenship as the majority of that Court announced (also, p. 9, amicus curiae brief of the American Bar Association herein).

In addition to the capable history stated by the dissent, only four years after the exact clause at issue of the Fourteenth Amendment was proposed by the Senate itself, a Treaty was unanimously ratified in the same Senate which expatriated citizens who became naturalized as British subjects (16 U. S. Stat. 775; p. 514, Executive Journal of the Senate, July 8, 1870).

A treaty is entitled to profound respect, nearly coordinate with the Constitution, and the Constitution interpreted as being in contradiction only in the clearest cases. Missouri v. Holland, 252 U. S. 416, 433-34; U. S. v. Reid, 73 F. 2d 153. The very purpose of the union of the States was to provide a more effective power in foreign affairs by union. Therefore the Fourteenth Amendment was not intended by its framers to prevent expatriation in situations of dual allegiance.

Afroyim v. Rusk was an erroneously conceived, and unnecessary, usurpation of the powers of the Congress.

II

EVILS OF A CONTRARY DECISION

If appellee is found here to be a United States citizen, there is created a horde of dual nationals with vested permanent absentee United States citizenship, all those persons previously expatriated for lack of residence in the United States, including those who before never even troubled to inform the Department of State of their parentage. Anytime in their lifetime they may claim the benefits of 22 U.S.C. 1732. Zemel v. Rusk, 381 U.S. 1, 15. No one is going to get them to sign a renunciation, and, under Afroyim, there is no other way to end their citizenship.

Then, because of their affinity and numbers, it is quite likely that they will produce, nay, have already produced, a second generation of vested citizens claiming under both parents, not mentioning those claiming under a single parent. Does one say the statute requires residence in the United States of one of the parents to transmit citizenship to one born abroad? If one says that a citizen living his whole life abroad cannot transmit citizenship abroad just as well as a

citizen who limited his right to live abroad by staying the required time in the United States, one is saying that his citizenship is "second class," limiting "their rights to live and work abroad in a way that other citizens may" (Schneider v. Rusk, 377 U.S. 163, 168-9; in which case the Court also mentioned that the citizenship of Mrs. Schneider's sons born abroad turned on hers, p. 164). One may expect an attack on the condition in the statute for "discrimination that is so unjustifiable as to be violative of due process," possibly by amicus curiae American Bar Association for the grandchild of two members of amicus curiae Association of American Wives of Europeans, as evidenced by their Brief herein.

Foreign countries could actually force us to accept these citizens and place them in orphanages or on public relief. As citizens, they could not be denied entry.

In any event, we have the great burden of protecting a dual national in the country of his other nationality. We cannot change the law so as to discriminate between two classes of United States citizens without risking a violation of due process. The dual national most needs protection and is the class of citizen most likely to be found in that country.

Appellant's Brief (p. 27) notes that the policy of our government was once to protect dual nationals from forced military service in the other country for three years until they

became 21.

The United States came near to war over dual nationality before the 1870 Treaty with Great Britain (overlooking the wars of 1776 and 1812). Americans returning to Ireland requested protection and in sympathy Irishmen in the United States rioted and threatened Canada with invasion. Finally England changed its centuries-old citizenship law and signed the Treaty recognizing the right of expatriation. Can one imagine the excesses thatpublic opinion might drive our government to in order to protect dual nationals if the Russians help Egypt crush Israel? Nuclear war could result. Recall that Mr. Afroyim was a dual national. Afroyim v. Rusk, 387 U. S. 253, 270. There has even been a charge that the Egyptians have captured a dual citizen fighting for Israel.

Further, should we say that any foreign born child of a United States citizen, even one who does not take up permanent residence by the age of 23 in the United States, risks being forced to fulfill the duties of United States citizenship if he is caught here as a tourist, can he be imprisoned for failure to file a tax return on his foreign income or for failure to register for the draft or for some act abroad contrary to our national interest such as treason, all because he did not make an election effectively, according to our lights, expatriating himself of our nationality? See Kawakita v. U. S., 343 U. S. 717, note. 18. Mr. Kawakita could have paid with his life for a mistake of dual nationality.

Dual nationals have the tendency to turn into "fair-weather citizens" (Appellant's Brief, p. 22). Appellant Bellei did not register under Selective Service when he became 18, although he had previously travelled to the United States three times on United States passports, the last time on his own passport. He finally registered in his 20th year (Appellee's Brief, p. 3). He was warned by the passport office he must begin 5 continuous years of United States residence by his 23rd birthday to retain his citizenship, and he did so 4 days before said birthday. During his 23rd year he terminated said residence (despite warning) about the time he was ordered to report for induction. He did not appear to value his citizenship. He was informed he had lost both his citizenship and military obligation after one year abroad. He filed this action after he passed 26 years old.

It must be admitted that his induction report was deferred, apparently because of some defense work he found in Italy. Without knowing all the facts, one can only guess at the possibility that he played both sides of the street: first using United States citizenship to escape Italian military service, and then going to Italy to escape imminent United States military service. Now he wants his citizenship back.

Human nature being what it is, no mere declaration of allegiance can be seen to be as convincing as would have been the 5 years of residence, with military service, taxpaying,

and developing a real feeling of oneness for his country. Since Appellee can do on his present Italian passport what he apparently did on his United States passport, one wonders deeply why he wants to regain citizenship, this statement assuming his several months residence here was no more than a visaed visit.

Amicus curiae contends that the statute assailed by appellee and held unconstitutional below was a reasonable effort by the Congress to recognize appellee's native and continuing allegiance to Italy as incompatible with derivative allegiance to the United States, or equivalent to voluntary expatriation. The statute is a constitutionally reasonable exercise of power to deal with the evils of dual nationality as they exist in the material world. A somewhat different case would have been presented if appellee had fulfilled the requirements of renouncing Italian citizenship while off Italian soil and while adult. The Fourteenth Amendment does not apply to either case, only the Fifth Amendment applies as citizenship is subject to reasonable conditions against dilution of allegiance. As the right to interstate travel is certain although it is not possible for all to agree on where it is secured in the Constitution; so incompatible dual nationality is forbidden, though all cannot agree on a single authority. Indeed the authority for each may be precedent to the Constitution itself.

CONCLUSION

Dual allegiance is a potential evil which should be subject to reasonable, flexible legislation and decisions instead of being frozen into a constitutional mold. The Court should reverse the judgment in the light of the statute constitutionally requiring residence as a pragmatic indication of election of allegiance.

Respectfully submitted,

JAMES SINCLAIR

Amicus Curiae

September, 1970